No. 340.

Reply Brief of Parties.

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JAMES H. MCKENNEY,
Clerk of the Court

Brown for Appellant.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1900.

Filed Dec. 29, 1900.

No. 340.

JOHN H. GOETZE, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF JOHN H. GOETZE & CO.,

Appellant,

vs.

THE UNITED STATES,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT IN REPLY.

EDWARD C. PERKINS,
ALBERT COMSTOCK,
EVERIT BROWN,
Of Counsel with Appellant.

In the Supreme Court of the United States,

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JOHN H. GOETZE, doing business under the firm name and style of JOHN H. GOETZE & Co.,
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BRIEF FOR APPELLANT IN REPLY.

I.

The position of the Government, upon that branch of the case to which the argument of the learned Attorney-General was chiefly devoted, is thus stated in his brief (p. 4):

> "The Government contends * * * that "it is within the constitutional province of "the treaty-making power to accept the ces- "sion of foreign territory upon such terms, "conditions and limitations *as to its internal*

> " *status* as may best subserve the interests of
> " the United States, and it is not necessary to
> " invest the territory with the *full status of*
> " *an integral part of the Union.*"

" The internal status of territory " as the words are here used, must mean, we presume, the relation of the inhabitants to the government ; its powers over them ; their rights as against it.

But what is meant by " an integral part of the Union ? " Of course the expression does not refer to Statehood. No one claims that a new territory becomes a State by the act of annexation. Nor does it refer to political rights. No one claims that the inhabitants are legally entitled to them. It means nothing more, then, than a territory which belongs to the United States, and which is under the government of the United States (per TANEY, C. J., 9 How., 614) ; and in defining the " status " of such a territory, we are not assisted when we are told that it is, or is not, " an integral part of the Union."

This expression, like that used from the Bench during the argument—" *incorporation* into the United States "—is, perhaps, a convenient short term to designate the condition of an annexed territory whose inhabitants stand in the same relation to our Government as those of the territories heretofore included in our dominions ; but it does not serve the purpose of a definition ; and its use is purely conventional.

And the whole claim of the Government, which we have just quoted, resolves itself simply into this, that when the United States acquires territory *by treaty*, the Government may, in and by the

treaty, determine what relations shall subsist between it and the inhabitants; what powers it shall have over them; what rights, if any, they shall have as against it.

If this assertion be sound, it must be because the Government has the broad, substantive power to "determine the status" of new territory, whether acquired by treaty, by conquest, or by discovery; it cannot depend upon the grant of the treaty-making power.

The power to make treaties, if it has no other limitations, is surely limited by the nature of the grant. Nothing can be done under it which is not properly the subject of a treaty.

How far, then, is the determination of the relations of the "new master" to the ceded territory legitimately the subject of a treaty? Obviously no further than as it may, in the broadest contemplation, be a matter which concerns the ceding power. And this will not carry it a single step beyond the guaranteeing of rights to the inhabitants as against that new master. Beyond this, the question of their mutual relations is a matter of no concern except to it and to them; it is a matter of domestic, not of international, policy.

It is therefore a logical necessity that the Government should assert, that whenever and however it acquires territory, it is empowered to determine its own relation to that territory and to its inhabitants; in other words, to determine what its own nature and powers shall be.

It also follows, from the fact that the determination is not properly within the scope of the treaty-making power, that it must be made by the Congress, not by the President and Senate alone.

And if the power to make this determination is established, there goes with it the power to alter that determination from time to time. It is not a power to make a constitution, but a power of irresponsible government according to a mutable discretion.

And this power must be exercised in the Capitol at Washington, by the Congress of the United States, sitting in a dual capacity, and exercising in confused conjunction the repugnant functions of a maker of imperial ukases and of *constitutional laws*.

Whether the Government's position is sound or not is discussed in our main brief. We are now solicitous only to emphasize the fact, that the claim is logically and necessarily one of UNLIMITED POWER FOR ALL TIME.

II.

The exigencies of the subject compelled the learned Attorney-General to make the further assertion (Brief, p. 5), that the obligation of uniformity in duties, imposts and excises extended no further than "the territory comprised within the sev-"eral States of the Union, and was intended only "for their benefit and protection, and not for the "benefit and protection of outside territory belong-"ing to the nation."

But we submit that he forgets, that the protection and benefit which, he says, was intended to be conferred upon the States of the Union, is seriously curtailed by this assertion.

If the uniformity provision does not forbid the laying of a duty impost or excise, for the general purposes of the Government, which shall fall only upon the territory outside of the States, neither does it forbid the laying of such a tax which shall fall only on the States, and not on the territories. In that case, the "benefit and protection" of uniformity would be denied, not to the inhabitants of the territories, but to those of the States.

It is not the right to be included in a general tax, but the security that others shall not be excluded from it, which is the constitutional immunity—whatever its extent—secured by the uniformity clause.

If Louisiana were now governed under the Jeffersonian system as understood by the learned Attorney-General, her exclusion from her share of the burden of an impost or excise, imposed elsewhere, would leave no greater or less a part of that burden to be borne in the other States than if, being one of their number, she were so excluded.

As we pointed out in our main brief, such unequal taxation might, in the early days of the Republic, have served the purposes of a hostile combination of States against States; nor, indeed, can it be said with certainty that at any day a power so opposed to our principles of equality, might not, if it existed, be used for such a purpose.

III.

The question having been raised, how far this Court, in reaching its conclusions upon the matters

now submitted to it for decision, can, and should, consider the consequences which may ensue, the undersigned submit, with great deference, their views upon the subject:

They believe that the particular consequences of the decision, one way or the other, of a particular case, are not to be considered by the Court; but that general consequences presumably considered by the framers of a written law, must and should be considered in determining its meaning.

They believe therefore that whenever the language of the Constitution, being before this Court for construction, is not so plain and unambiguous as to determine the question at issue, this Court is not merely empowered, but is bound, not only to resort for light to "the general tenor and object of the instrument," but to take account of those evident and general results of the interpretation sought to be put upon a particular clause, which may reasonably be supposed to have been present in the minds of those who framed it; and that in so doing it must be remembered that "the instrument was not "intended to provide merely for the exigencies of "a few years, but was to endure through a long "lapse of ages, the events of which were locked "up in the inscrutable purposes of Providence" (*per* STORY, J., 1 Wh.,304).

They emphatically believe that the Court is bound to consider, as a determining factor against a suggested construction of the Constitution, a consequence which renders it "*mischievous, or re-*"*pugnant to the general spirit of the instru-*"*ment,*" and they have not hesitated, in the main brief, to adopt a line of argument based upon such considerations, in refutation of the construction of

the Constitution which the Government seeks to uphold.

If, then, any argument can be found in favor of the claim of the Government to absolute power outside of the States of the Union, which is not too restricted in its application to take account of the territory held when the Constitution was adopted, and of nearer regions whose annexation may easily be supposed to have been contemplated by them, as well as of the "peopled countries of "ASIA, AFRICA, or Oceania" lying "across the "then almost untravelled expanse of ocean" (*Brief for the Gov't, p. 146*), and if the Court finds in that claim nothing contrary to the letter or to the evident spirit and purpose of the Constitution, we cheerfully admit that it may, and should, give weight to such argument, and avail of such assistance as it may give towards ascertaining the *general* rule of the Constitution upon the subject.

But we claim that the particular inconveniences which might arise from governing some particular territory according to the rule of the Constitution, suggest merely political arguments proper to have been urged against its annexation, and that neither they, nor the special benefits, material or other, which would accrue, are properly a part of an argument addressed to this Court, or can assist or influence it in construing that instrument which contains the "definition and limitation of the power" of the Government.

We deny "the doctrine, that because the Con-"stitution has been found, in the march of time, "sufficiently comprehensive to be applicable to "conditions not within the minds of its framers,

"and not arising in their time, it may, therefore, "be * * * amended by judicial decision with- "out action by the designated organs in the mode "by which alone amendments can be made."

McPherson v. *Blacker*, 146 U. S., 1, 36.

And, finally, we repeat the words of a great Judge, solemn and convincing enough in themselves, but bearing a trebled weight of solemnity and conviction because of the occasion on which they were uttered (*Dred Scott* v. *Sandford*, 19 How., 620):

> "Political reasons have not the requisite "certainty to afford rules of juridical interpre- "tation. They are different in different men. "They are different in the same men at dif- "ferent times. And when a strict interpreta- "tion of the Constitution, according to the "fixed rules which govern the interpretation "of laws, is abandoned, and the theoretical "opinions of individuals are allowed to "control its meaning, we have no "longer a Constitution; we are under "the government of individual men, who, for "the time being, have power to declare what "the Constitution is, according to their own "views, of what it ought to mean. When "such a method of interpretation of the Con- "stitution obtains, in place of a republican "government, with limited and defined powers, "we have a government which is merely an "exponent of the will of Congress; of what, "in my opinion, would not be preferable, "an exponent of the individual political opin- "ions of the members of this Court."

IV.

In view of the great insistence of the learned Attorney-General upon opinions expressed in Congress during the Louisiana and the Webster-Calhoun debates, and on the construction placed upon the constitution by the government, in former cases of annexation, and in order that the historical incidents to which he refers may be accurately understood, we refer in an appendix to this brief to a number of the incidents with which he deals so fully.

So far as governmental action is concerned, there is but one instance in which it can be said that our theory of the constitution has been departed from; the depriving for a short period the inhabitants of Louisiana territory, not one of whom, so far as is known, ever sought to enforce his rights, of the right of trial by jury in civil cases involving less than one hundred dollars. This is certainly far from being "a practical construction of the "Constitution, nearly contemporaneous with its "adoption and continued through a long series of "years" (CURTIS J., 19 How., 616; quoted in the Government's brief at p. 173), and could hardly "influence" much less "determine," even in "a "doubtful case," "the judicial mind." But this claim, we submit, is not of such a nature that the action of the Government for any length of time could confirm it; it belongs to the class of which Chief-Justice MARSHALL said: "It will not "be denied that a bold and daring usurpation "might be resisted, after an acquiescence still "longer and more complete than this" and not to that of which he spoke when he "conceived

"that a doubtful question, one on which "human reason may pause, and the human "judgment be suspended, *in the decision of* "*which the great principles of liberty are not* "*concerned*, but the *respective powers* of those "who are equally the representatives of the people, "are to be adjusted ; if not put at rest by the prac- "tice of the government, ought to receive a con- "siderable impression from that practice" (4 Wh., 401).

EDWARD C. PERKINS,
ALBERT COMSTOCK,
EVERIT BROWN,
Of Counsel with Appellant.

APPENDIX I.

Jefferson's doubts as to the constitutionality of the Louisiana Purchase and Treaty.

See the brief for the Government, p. 31.

It is claimed that Thomas Jefferson is the father of the doctrine of the unlimited and extraconstitutional power of the Government over territory acquired outside of the original boundaries of the United States; that "Jefferson's doubt was not "with reference to the power of the United States "*to acquire foreign territory*, but rather as to the "right to annex it to and make it a part of the "United States."

If Jefferson had not doubted the power to take Louisiana, he certainly could not have doubted the power to hold and to govern it and its inhabitants. If he had believed in the absolute right to hold and to govern it, he could hardly have disbelieved in the right—for which the learned Attorney-General, elsewhere in his brief, stoutly contends—to provide by treaty, as a consideration for a cession, for the observance of such restrictions, in the government of the people whose allegiance was to be transferred, as might secure their personal liberty and rights. The fact is, that the question of the extent of the power of *governing* new territory was a matter not so much as considered, among the constitutional questions which arose upon the purchase.

The following passages show, as we believe, (1)

Jefferson's conception of the importance of the purchase, overriding all constitutional objections, which he was willing to leave to be cured by an amendment, and (2) that what he doubted, was, the power to acquire the territory, and the constitutionality of the *promise* in the treaty, for the admission of the territory as a State, or States, or, as the treaty expressed it, for "incorporating the inhabitants into the *Union* of the United States."

Jefferson to Monroe, January 13th, 1803:

> "On the event of this mission depends the
> "future destinies of this republic. If we can-
> "not by a purchase of the country insure to
> "ourselves a course of perpetual peace and
> "friendship with all nations, then as war can-
> "not be distant, it behooves us immediately
> "to be preparing for that course * * ."
>
> *VIII. Ford's Writings of Thomas Jefferson, 191.*

Jefferson to Dupont de Nemours, Feb. 1st, 1803:

> "He (Monroe) goes, therefore, joined with
> "Chancellor Livingston, to aid in the issue of
> "a crisis, the most important the United States
> "have ever met since their independence, and
> "which is to decide their future character and
> "career * * * Our circumstances are so
> "imperious as to admit of no delay as to our
> "course; and the use of the Mississippi so in-
> "dispensable, that we cannot hesitate one mo-
> "ment to hazard our existence for its main-
> "tenance" (*id.*, 205).

Jefferson to Livingston, Feb. 3d, 1803:

"We must know at once whether we can ac-
"quire N. Orleans or not. We are satisfied
"nothing else will secure us against a war at
"no distant period" (*id.*, 209).

Jefferson to Gallatin, Jan., 1803:

"You are right, in my opinion, as to Mr.
"L.'s proposition: there is no constitutional
"difficulty as to the acquisition of territory,
"and whether, when acquired, it may be *taken*
"*into the Union* by the Constitution as it now
"stands, will become a question of expediency.
"I think it will be safer not to permit the *en-*
"*largement of the Union* but by amendment
"of the Constitution." (1 Wr. of Gallatin,
115.)

Jefferson to Breckinridge, Aug., 12th, 1803:

"The legislature in casting behind them
"metaphysical subtleties, and risking them-
"selves like faithful servants, must ratify [the
"treaty] and pay for it, and throw themselves
"on their country for doing for them unau-
"thorized what we know they would have
"done for themselves had they been in a situ-
"ation to do it. It is the case of a guardian
"investing the money of his ward in purchas-
"ing an important adjacent territory, and say-
"ing to him, when of age, I did this for your
"good; I pretend to no right to bind you; you
"may disavow me, and I must get out of the
"scrape as I can; I thought it my duty to
"risk myself for you. But we shall not be
"disavowed by the nation; and their act of
"indemnity will confirm and not weaken the
"constitution, by more strongly marking out
"its lines." (VIII. Ford's Wr. of Jefferson).

Jefferson appears to have written to the same effect to Thomas Paine, on the same day. Eight days later, he wrote again to these two correspondents—not, as is suggested in the brief of the Government, to modify in any way what he had said, but —to caution them against the danger, which had just become apparent to him, of an open discussion of the question.

Jefferson to Paine, Aug. 18th, 1803:

> "On the 10th inst. I wrote you on the subject of Louisiana, and mentioned the question of a supplement to the Constitution on that account. *A letter received yesterday* renders it prudent to say nothing on that subject, but to do *sub-silentio* what shall be found necessary. That part of my letter therefore be so good as to consider as confidential" (*id.* 245).

The letter to Madison of August 18th, quoted in part at page 37 of the brief for the Government, in which a similar warning is given, speaks, in an earlier passage (VIII, Wr. of Jefferson, 245) of letters received from Mr. Livingston, which evidently led him to fear a withdrawal on the part of France, and to realize the necessity of guarding against giving her any pretext for receding from the treaty.

Jefferson to Nicholas, September 7th, 1803;

> "I enclose you a letter from Monroe on the subject of the late treaty. You will observe a hint in it, to do without delay what we are bound to do. There is reason, in the opinion of our ministers, to believe, that if

"the thing were to do over again, it could not "be obtained, and that *if we give the least* "*opening, they will declare the treaty void.* "* * * Whatever Congress shall think it "necessary to do, should be done with as lit- "tle debate as possible, and *particularly* so "*far as respects the Constitutional dif-* "*ficulty.*"

* * * * * *

"I confess, then, I think it important, in the "present case, to set an example against "broad construction, by appealing for new "power to the people. If, however, our "friends think differently, certainly I shall "acquiesce with satisfaction; confiding, that "the good sense of our country will correct "the evil of construction when it shall pro- "duce ill effects."

Adams' History of the United States, Vol. II, p. 91:

"With these words, Jefferson closed his "mouth on this subject forever. Although "his future silence led many of his friends to "think that he ended by altering his opinion, "and by admitting that *his purchase of* "*Louisiana was constitutional*, no evidence "showed the change; but rather one is led to "believe that when in latter life he saw *what* "*he called the evils of construction* grow un- "til he cried against them with a violence "almost as shrill as in 1798, he felt most "strongly the fatal error which his friends "had forced him to commit, and which he "could neither repudiate nor defend. He had "declared that he would acquiesce with satis- "faction in making blank paper of the Con- "stitution."

APPENDIX II.

The Debate on the Louisiana Purchase.

I.

SENATE.

The treaty was approved by the Senate immediately on the assembling of Congress, on October 22d, 1803, by a vote of 24 to 7 (Am. Cong. 8th Cong. 1st Sess. 308).

The only reported debate in the Senate was on the bill to create a stock for the purchase price, on November 3d.

Only three opposition Senators spoke, and only two on constitutional questions. One of these, Mr. PICKERING (45), admitted the power to acquire the territory, but denied the power to "incorporate "the inhabitants into the Union of the United "States," upon the express ground that Article III of the treaty providing for such incorporation, was a promise to admit the territory to statehood. The other, Mr. TRACY (56), placed the same interpretation on Clause III, and objected to it on the same ground; he also denied the power to acquire by treaty.

The four senators who spoke for the administration were Messrs. TAYLOR, BRECKENRIDGE, ADAMS and NICHOLAS.

Mr. TAYLOR, the first to speak, said that the two objections presented were: "One that the United "States cannot constitutionally acquire territory;

" the other that the treaty stipulates for the ad-
" mission of a new State into the Union " (49).

Mr. TAYLOR (50), Mr. BRECKENRIDGE (62) and Mr. NICHOLAS (71), all defended the right to acquire territory, and derived it from the power to make war and to make treaties.

The third article was defended on various grounds ; Mr. TAYLOR asserting that it merely provided for incorporation "as a territory" and for the naturalization of the inhabitants by Act of Congress (52) ; Mr. BRECKENRIDGE and Mr. NICHOLAS asserting, without any reason stated, the power to admit to statehood (63, 71).

Mr. ADAMS thought the treaty valid, because Clause III was merely promissory, and could be performed by amending the Constitution, which he believed to be necessary (66).

Messrs. BRECKENRIDGE (62) and NICHOLAS (71) also argued that if the objection was valid, it could be cured by an amendment to the Constitution.

HOUSE OF REPRESENTATIVES.

THE FIRST DEBATE in the House was on October 25th, in Committee of the Whole, on the President's message transmitting the treaty to Congress. The Constitutional points raised by the opposition on Article III were solely those urged in the Senate, viz., the want of power to acquire, and to admit to statehood. The only opposition speakers on this subject were Messrs. GRISWOLD (N. Y.), THATCHER (Mass.) and GRISWOLD (Conn.) They all argued that the power to admit new States outside of the original boundaries was vested, if it existed, in Congress, and could not be exercised by the treaty-making power (433, 454, 561).

Messrs. GRISWOLD (N. Y.) and THATCHER denied absolutely the existence of the power. Mr. THATCHER said (454):

"The Constitution under which we now live is a "partnership of States; and it is not competent "to *admit a new partner* but with the consent of "all the parties" (454).

The speakers who undertook to answer these objections were Messrs. RANDOLPH (Va.), ELLIOTT (Vt.), SANFORD (Ky.), SMILIE (Pa.), NICHOLSON (Md.), RODNEY (Del.) and MITCHELL (N. Y.)

As to the right to acquire, Messrs. ELLIOTT (448), SMILIE (458), NICHOLSON (467), and MITCHELL (475), based it upon general sovereignty, or upon the right to make war and treaties.

As to clause III., the arguments were scattering. Mr. ELLIOTT argued in favor of the power to acquire *colonies*, and deduced it from *international law* (449); Mr. SANFORD, who very aptly described himself as "a plain western farmer," thought "the powers exercised on this occasion" were "possessed by the Government because they were "not prohibited" (453). Mr. SMILIE thought the difficulty as to admission to Statehood could be avoided by an amendment of the Constitution, or the territory could remain in a colonial state (458). Mr. NICHOLSON refused to discuss the question, saying it was one which would only arise in the future (467). Mr. RODNEY argued that the provision could not be unconstitutional, because the treaiy provided for incorporation only "according the principles ot the Federal "Constitution" (467). Mr. MITCHELL used the same argument (475). Mr. RANDOLPH (483) barely touched upon this point, but appears to have

argued briefly (487) that the treaty did not stipulate for admission to statehood, but only for the "rights and immunities of jury trial, liberty of "conscience, etc., which every citizen may chal- "lenge."

Messrs. ELLIOTT, SMILIE and RANDOLPH were the only speakers who did not either admit or assume that the treaty provided for statehood, but nothing fell from any of them to imply that the territory should, or could, be governed without regard to the Constitution.

THE SECOND debate in the House was on Oct. 27, and is reported in Ann. Cong., *ubi supra*, at pp. 497 *et seq.* It was on the bill to enable the President to take possession.

The bill provided (497) that until provision made by Congress for the *temporary* government, all the powers of the existing government should be vested in such persons, and exercised in such manner, as the President should direct.

The opposition was represented by Messrs. GRISWOLD (Conn.), ELLIOTT (Vt.) and JACKSON (Va.) They objected that the general powers vested in the President could not constitutionally be delegated to him. Mr. GRISWOLD (499, 508) stated the objection to be, that the bill vested legislative and judicial powers in the President (499). Mr. ELLIOTT's (499) and Mr. JACKSON's (510) objections were stated generally.

Mr. RANDOLPH, who represented the administration in the House, if anyone did, did not undertake to answer these objections, but said that he saw no other way of taking possession. He said:

"If * * * the gentlemen from Connec- "ticut will show us any way in which the

"country may be taken possession of, with "security, and by which the people may en- "joy *all the rights and franchises of citizens "of the United States immediately*, I shall be "happy to give it the sanction of my vote. "But to my mind this appears impossible "(500)."

Messrs. NICHOLSON (501), MITCHILL (502), DANA (504), EPPES (506), EUSTIS (506), defended the bill on the ground that there was no unconstitutional delegation of power, and that it was a measure of necessity. They did not attempt to argue that the Constitution did not "apply."

The suggestion that the Constitution did not "apply" does not seem to have been entertained by any one except Mr. VARNUM (Mass.), Mr. Smilie (Pa.), and Mr. RODNEY.

Mr. RODNEY, replying to Mr. Griswold's objection to the delegation of legislative and judicial powers, pointed out that the *particular* provision "relied upon by the gentleman from Connecticut "will not avail to support his argument (513). He likened the case to that of the other existing Territories; derived the power to govern from the "rules and regulations" clause, and said:

> "In the Territories of the United States, "under the ordinances of Congress, the Gov- "ernor and the Judges have a right to make "laws. Could this be done in a State? I "presume not. It shows that Congress have "a power in the Territories, which they can- "not exercise in States; and that the limita- "tions of power, found in the Constitution, "are applicable to States and not to Terri- "tories."

Evidently, in making this broad claim of power, Mr. RODNEY was arguing only against the political, not the civil, rights of the inhabitants, and his comparing Louisiana to the Northwest Territory, shows that he was not claiming any broader powers for Congress, than those which it concededly has.

Mr. RANDOLPH moved to amend by adding the clause "for maintaining and protecting the inhabitants," etc., at the end of Section 2. Agreed to without a division.

The Senate bill was passed in the House with the House amendments, without further debate, on October 31st (551).

The House debate on the Territorial bill will be found *ubi supra*, at p. 1054 *et seq.* (Feb. 28th and 29th, 1804).

The debate turned upon the question whether the people were not entitled to a representative form of government.

The provision of the Act, requiring a jury trial in civil cases, only where the amount involved was over one hundred dollars, was barely noticed (1129).

APPENDIX III.

General Jackson and Judge Fromentin.

This incident, which has been represented as constituting a decision by the Executive that the Constitution did not "apply" upon the acquisition of Florida, appears, on an examination of the documents, to have raised a mere question of the extent of the powers conferred upon an officer of the Government by the commission issued to him by the President.

The incident led to the sending to Congress by President Monroe of a voluminous document embracing the entire history of the case, which will be found in Annals of Congress, 17th Congress, 1st Sess., Vol. II (1821), pages 2296, &c.

The act passed on March 3rd, 1821, four months before the possession of Florida was delivered to the United States, which was modeled on the Louisiana act, provided as follows:

"Section 2. And be it further enacted that until the end of the first session of the next Congress, unless provision for the temporary government of said territory be sooner made by Congress, all the military, civil and judicial powers exercised by the officers of the existing government of the same territories shall be vested in such person and persons, and shall be exercised in such manner, as the President of the United States shall direct for the maintaining the inhabitants of such territories in the free enjoyment of their liberty, property and religion; and the laws of the United States

relative to the collection of revenue, and the importation of persons of colour shall be extended to the said territories; and the President of the United States shall be, and he hereby is, authorized, within the time aforesaid, to establish such districts, for the collection of the revenue, and during the recess of Congress, to appoint *such officers, whose commissions shall expire at the end of the next session of Congress, to enforce such laws*, as to him shall seem expedient."

3 Statutes at Large, Chap. XXXIX, page 639.

The commission of Judge Fromentin (*ubi supra*, p. 2374) appoints him to be "Judge of the United States for West Florida, and for that part of East Florida which lies westward of the Cape," and authorizes and empowers him to "exercise and fulfill the duties of that office according to the Constitution and laws of the United States * * during good behavior and until the next session of the Senate of the United States and no longer."

On August 20th, before the Callava affair, Judge Fromentin wrote a letter to Mr. Adams, Secretary of State, from which it appears that he and General Jackson had already begun a dispute as to the extent of the Judge's powers, General Jackson contending that "the court to which I am appointed is to be confined * * * to the revenue laws of the United States and to the act respecting people of color;" and Judge Fromentin, on the other hand, contending that he was appointed to the office of a territorial Judge, and had the same powers as the Judges of the Courts of other terri-

tories. There was of course no ground for this contention, as no such Court has been created for Florida. It appears fron the same letter that General Jackson "had already created a territorial Court consisting of five Judges" (p. 2375).

Judge Fromentin having issued his writ of habeas corpus to release Callava, and General Jackson having refused to recognize it and having summoned the Judge before him and reprimanded him, the Judge and the General each wrote to Washington complaining of the other. Mr. Adams wrote to General Jackson on October 26th, enclosing a copy of a letter to Judge Fromentin, "informing him that it was intended that his jurisdiction should be confined to the execution of the only laws of the United States which by Act of Congress had been extended to the territories of the Floridas, namely: the laws relating to the revenue and its collection and to the slave trade. In the execution of these laws, which are of a nature entirely distinct from those of Spain operating in the province, the President is of opinion that he should be amenable only to the Government of the United States" (*ubi supra*, 2332).

In a letter of the same date to Judge Fromentin, Mr. Adams says: "I am directed by him [the President] to inform you that the laws of the United States relative to the revenue and its collection and those relating to the slave trade have been the only ones extended by Act of Congress to the territories of Florida. It was to the execution only of them that your commission as Judge of the United States was considered and in-

tended to apply. The President thought the authority of Congress alone competent to extend other laws of the United States to the newly acquired territory; nor could he give to the Judge a jurisdiction which could only be conferred by them. There being an essential difference between the nature of the powers heretofore exercised by the Spanish authorities in these provinces, which were centinued in force by the act of the 3d of March last to the end of the next session of the Congress, unless a temporary government should be sooner extended over them, and of the laws of the United States which were extended to those provinces by that law, the President considered it his duty to intrust the execution of *each branch* to officers especially appointed for the purpose. In the execution of those laws in your judicial capacity, the Governor has been informed that you are considered amenable only to the Government of the United States."

It is evident that in the view taken by the administration the appointment of Judge Fromentin was under the authority conferred by the latter part of Section 2 of the Act of March 3d, 1821, quoted above, authorizing him to appoint such officers to enforce the laws relative to the collection of revenue and the importation of persons of color as to him should seem expedient; and that the general administration of justice was left to General Jackson, under the broad powers conferred upon him by virtue of the former part of the same section.

APPENDIX IV.

The Webster Calhoun Debate; "Extending the Constitution."

Up to the time of this debate, it had never become necessary for those who opposed anti-slavery legislation in the Territories to *argue* the question whether the Constitution was in force in the Territories, because no one had denied it; though it was, of course, a tacit premise in the argument leading to their assertion that the Constitution forbade interference by Congress with the right to take slaves into the Territories.

The doctrine as to the power of Congress over slavery in the territories immediately before this debate is well illustrated by the resolutions of the Virginia and Missouri Legislatures in 1849.

VIRGINIA RESOLUTIONS,

Adopted March 8, 1847, and reaffirmed in 1849.

"1. Be it resolved unanimously by the General Assembly of Virginia that the Government of the United States has no control, directly or indirectly, mediately or immediately, over the institution of slavery, so as to impair the right of the slaveholder; and that in taking any such control, it transcends the limits of its legitimate functions, by destroying the internal organization of the sovereignties who created it.

"2. Resolved, unanimously, that all territory which may be acquired by the arms of the United States, or yielded by treaty with any foreign

power, belongs to the several States of the Union as their joint and common property in which each and all have equal rights; and that the enactment by the Federal Government, of any law which shall, directly or by its effects, prevent the citizens of any State from emigrating, with their property, of whatever description, into such territory, would make a discrimination unwarranted by and in violation of the compromises of the Constitution, and the rights of the States from which such citizens emigrated, and in derogation of that perfect equality which belongs to the several States as members of the Union; and would tend directly to subvert the Union itself."

XVI Benton's Abr., 298.

MISSOURI RESOLUTIONS.

Adopted by the General Assembly in 1849.

"1. That the federal constitution was the result of a compromise between the conflicting interests of the States which formed it, and in no part of that instrument is to be found any delegation of power to Congress to legislate on the subject of slavery, excepting some special provisions having in view the prospective abolition of the African slave trade, and for the recovery of fugitive slaves. Any attempt, therefore, on the part of Congress to legislate on the subject so as to effect the institution of slavery in the States, in the District of Columbia, or in the Territories, is, to say the least, a violation of the principles on which that instrument was founded.

"2. That the territory acquired by the blood and treasure of the whole nation ought to be

governed for the common benefit of the citizens of all the States; and any organization of the territorial governments excluding the citizens of any part of the Union from removing to such territories with their property would be an exercise of power by Congress inconsistent with the spirit upon which our federal compact was based, insulting to the sovereignty and dignity of the States thus affected, calculated to alienate one portion of the Union from another, and tending ultimately to disunion."

XVI Benton's Abr., 380.

The Debate.

The famous debate between Mr. Webster and Mr. Calhoun occurred in the Senate on February 21-28, 1849, and is reported in 20 Cong'l. Globe (Appendix) 252.

The debate was on an amendment offered to an appropriation bill by Mr. Walker of Wisconsin, providing that "the Constitution of the United "States and all and singular the several acts of "Congress respecting" shipping, coasting trade, tariff, sale of public lands "and all and singular "the other acts of Congress of a public and gen-"eral character, and which are suitable and proper "to be applied to" California and New Mexico, &c., "be and the same hereby are extended over and "given full force and efficacy in said territory" and giving general authority to the President for their government.

Mr. Walker's purpose in offering his amendment was thus stated by him (267):

"Sir, my feelings upon slavery are, per-

"haps, as well known as those of any other "Senator upon this floor. But, sir, I say be- "fore this Senate, and before High Heaven, "that I feel myself incapable of entertaining "any such feelings as those entertained by the "Senator from New Jersey. If the Constitu- "tion will extend slavery to the land, then let "it go. If by that Constitution slavery is ex- "tended, I am willing to stand by that Con- "stitution. I am unwilling to withhold from "my Southern brethren any of the rights "given to them by that sacred instrument."

But when asked whether he believed the "extension" to be necessary, he said:

"My own opinion is, that the Constitution "of the United States extends there *in all its* "*appropriate provisions.* * * * I believe, "then, sir, that the Constitution has been in "force there since the treaty with Mexico, "and that it follows every American citizen "there, and extends its protection to him as "far as it can be made applicable to that end" (268).

The following passages from Mr. Webster's speech, which are not among those cited by the learned Attorney-General, are important to an understanding of his doctrine:

"Mr. President, it is of importance that we "should seek to have clear ideas and correct "notions of the question which this amend- "ment of the member from Wisconsin has "presented to us; and especially that we "should seek to get some conception of what

"is meant by the proposition, in a law, to "'extend the Constitution of the United "' States to the Territories.' Why, sir, the "thing is utterly impossible. All the legisla- "tion in the world, in this general form, could "not accomplish it. There is no cause for the "operation of the legislative power in such a "matter as that. The Constitution, what is it "—we extend the Constitution of the United "States by law to a Territory? What is the "Constitution of the United States? Is not "its very first principle that all within its "influence and comprehension shall be re- "presented in the Legislature which it estab- "lishes, with not only the right of debate and "the right to vote in both Houses of Congress, "but a right to partake in the choice of the "President and Vice-President? And can we "by law extend these rights, or any of them, "to a Territory of the United States? Every- "body will see that it is altogether imprac- "ticable" (p. 272).

Later in the debate Mr. UNDERWOOD (Ky.) said (281):

"I never heard until yesterday the Senator "from Massachusetts express the opinion that "the Constitution in its provisions did not "extend to the Territories of the United "States * * *.

"You have officers in the Territories * * "All of them are required to take an oath or "affirmation which obliges them to support "the Constitution * * How can they sup- "port the Constitution unless by respecting "and enforcing its principles and provisions?

"The learned Senator from Massachusetts "says, and says most appropriately and forci- "bly that the principles of the Constitution "are obligatory upon us even while legislating "for the Territories. That is true, I admit, "in its fullest force; but if it is obligatory "upon us while legislating for the Territories, "is it possible that it will not be equally oblig- "atory upon the officers who are appointed to "administer the laws in these Territories?"

Mr. Webster.—"I never said it was not "obligatory upon them. What I said was, "that in making laws for these Territories, it "was the high duty of Congress to regard "those great principles in the Constitution "intended for the security of personal liberty "and for the security of property."

Mr. Underwood.—"* * * Suppose we "provide by our legislation that nobody shall "be appointed to an office there who professes "the Catholic religion. What do we do by an "act of this sort?"

Mr. Webster.—"We violate the Constitu- "tion, which says that no religious test shall "ever be required as qualification for office."

* * * * *

Mr. Westcott (p. 287).—* * * "Not an "American citizen there" (*i. e.*, in California) "can be arrested for crime, nor can his castle "be searched or invaded, except as allowed by "the Constitution. There must be a warrant "issued upon an affidavit. I ask the Senator "is not this so?"

Mr. Webster.—"That depends upon the "laws of the place."

In commenting on this debate, Prof. Von Holst says :

"They" (the Territories) "are not limbs, but constituent parts of the Union. Therefore the doctrine that the Constitution becomes valid as to the Territories only by legislation—although Webster defended it—is utterly inadmissible. The Constitution is not only the fundamental law of the United States, but it is the Constitution of the United States, and this name comprehends within itself the whole domain of the Union. If the Territories were not subject to the Constitution, Congress could pass no laws about them, for it possesses no power outside of the Constitution. Webster's principle is true only in this ; that a large part of the Constitution does not apply to the Territories. They have no rights of their own under the Constitution, and cannot be granted any such by Congress. The *inhabitants* of the Territories, who are citizens of the United States by birth or naturalization, have all the rights guaranteed or granted by the Constitution or the laws to citizens of the United States as such. But they have not and cannot have the rights which belong to the citizens of the States by virtue of the constitutional rights of the States."

Von Holst's Constitutional Law, p. 183.

APPENDIX V.

Chief Justice Chase's views on the "Extension" of the Constitution.

"In my judgment, there was no necessity for a provision of law extending the Constitution of the United States over the Territory. The moment we acquire any territory, in my judgment, it comes under the operation of the Constitution of the United States. No act of Congress is needed to extend the Constitution over it. It comes at once under the jurisdiction of Congress; the authority of the General Government of the Union embraces it; and, in their action upon every subject within a territory, the Congress of the United States and the General Government of the Union are bounded and limited by the terms of the Constitution. The General Government, and Congress as the legislative department of the General Government, have that power in every Territory which the Constitution confers, and they have that power under the limitations which the Constitution imposes. But, out of extreme caution perhaps, this bill, in its terms, extends the Constitution and laws of the Union over the Territories created by it; and then it goes on, in a subsequent paragraph, to declare that it is not the intention of the bill to legislate slavery into the Territories or out of the Territories, but to leave that matter at the disposal of the people, subject only to the Constitution of the United States.

"As I have already said, the words 'subject to the Constitution of the United States,' in this connection, were totally unnecessary. Neither Con-

gress nor Territorial Legislatures can exercise any powers prohibited by the Constitution."

Debate on Kansas-Nebraska Bill, March 2d, 1854 (35 Cong. Globe, 280).